

State of Missouri
Office of Secretary of State

Case No. AP-06-28

IN THE MATTER OF:

GREGORY DALE BERGMAN
dba CLAYTON FINANCIAL GROUP
CRD No. 2787786

Respondent.

Serve at:

546 NW Valleybrook Road
Blue Springs, Missouri 64014

**ORDER TO CEASE AND DESIST AND ORDER TO SHOW
CAUSE WHY CIVIL PENALTIES AND COSTS SHOULD NOT
BE IMPOSED**

On December 19, 2006, the Enforcement Section of the Securities Division of the Office of Secretary of State, through its Deputy Chief Counsel, Katie Whitman, submitted a Petition for Order to Cease and Desist and Order to Show Cause Why Civil Penalties and Costs Should Not Be Imposed. After reviewing the petition, the Commissioner issues the following findings of fact, conclusions of law and order:

I. FINDINGS OF FACT

1. Gregory Dale Bergman ("Respondent") has a residential address of 546 NW Valleybrook Road, Blue Springs, Missouri 64014. Respondent purports to sell insurance products through a sole proprietorship, Clayton Financial Group ("Clayton Financial"). Clayton Financial's address is 546 NW Valleybrook Road, Blue Springs, Missouri 64014.
2. Respondent was employed by Great American Investors, Inc. ("Great American"),[\[1\]](#) as a Missouri registered agent from September 16, 2003, until his termination on December 31, 2004. Respondent had a Central Registration Depository Number of 2787786.
3. Respondent was employed by MetLife Securities, Inc. and Metropolitan Life Insurance Company (collectively "MetLife")[\[2\]](#) as a Missouri registered agent from July 8, 1996 until his termination on August 12, 2003.

A. Kansas Resident ("KR")

4. Respondent was the registered agent on the IRA of a Kansas Resident ("KR") while Respondent was employed at Great American.

5. On or about September 21, 2004, Respondent asked KR if Respondent could borrow \$5,000 from KR because Respondent was opening his own financial business and needed the money for a “store front” and other purposes relating to the opening of his new business.
6. KR authorized Respondent to withdraw \$5,000 from KR’s IRA, and Respondent advised State Street Bank and Trust (“State Street”),[\[3\]](#) the trustee for KR’s IRA, to process a request for a cash withdrawal and have the funds sent to KR.
7. On September 21, 2004, mutual fund shares were sold from KR’s IRA totaling \$5,000 and a distribution was made in the amount of \$5,000.
8. Respondent informed KR that he would repay KR within 60 days with interest at 10% plus an additional \$750 bonus.
9. According to IRS Publication 590 (2005), an early (*i.e.* premature) distribution from an IRA subjects the taxpayer to normal income tax (the amount withdrawn must be added to gross income), plus a 10% early distribution penalty, unless the taxpayer makes a timely rollover by replacing the funds in a proper retirement vehicle within 60 days.[\[4\]](#)
10. KR relied on Respondent’s promise to return \$5,000 within 60 days so that KR would avoid paying income tax and a 10% penalty on the \$5,000 loaned to Respondent.
11. After Respondent effected the sale of KR’s mutual fund shares and the early distribution from KR’s IRA, Respondent instructed KR to write Respondent a check for \$5,000 from the proceeds of the premature distribution.
12. Respondent sent KR the following letter, signed by Respondent on Clayton Financial letterhead with an address of 546 NW Valleybrook Road, Blue Springs, Missouri 64014, and dated September 24, 2004:

As per our conversation, I have removed \$5,000.00 dollars from your IRA account and had the check sent to you overnight.

I will be receiving a check from you for \$5,000.00 as a loan to offset my cash flow problem. I will put this amount back in your account within 60 days with a 10% interest payment and a \$250.00 bonus. This would mean I would have put back into your account \$5,750.00.

If by chance there is a delay in commissions I will begin paying the interest and bonus to your account, then work on the principal.

Thank you very much for the help with this matter.

Sincerely,
/s/ Gregory Bergman
Gregory Bergman

13. On or about November 10, 2004, Respondent told KR that he needed additional money to further develop his business and that if KR would loan Respondent an additional \$3,000 it would help with Respondent's "credit score." Respondent stated he would repay KR within 60 days along with interest of 10% plus a total bonus payment of \$1,000 for both loans.
14. Respondent stated Respondent would advise State Street to process the request for a cash withdrawal from KR's IRA and have the funds sent to KR.
15. On November 10, 2004, mutual fund shares were sold from KR's IRA account totaling \$3,000 and a distribution was made from KR's IRA in the amount of \$3,000.
16. KR relied on Respondent's promise to return \$3,000 within 60 days so that KR would avoid paying income tax and a 10% penalty on the \$3,000 loaned to Respondent.
17. Respondent again asked KR to write Respondent a check after receiving and depositing the distribution check from State Street.
18. Respondent sent KR the following letter, signed by Respondent on Clayton Financial letterhead with an address of 546 NW Valleybrook Road, Blue Springs, Missouri 64014, and dated November 16, 2004:

As per our conversation, I have removed \$8,000 dollars from your IRA account and had the check sent to you overnight.

I will be receiving a check from you for an additional \$3,000.00 as a loan to offset my cash flow problem. I will put the \$5,000.00 back within 60 days and the \$3,000.00 back within sixty days of withdrawal. They will include a 10% interest on principal and a \$250.00 bonus.

If by chance there is a delay in commissions I will begin paying the bonus and interest to your account, then the principal.

Thank you for your help in this matter.

Sincerely,
/s/ Gregory Bergman
Gregory Bergman

19. Respondent did not repay KR \$5,000 within 60 days of September 21, 2004.
20. Respondent did not repay KR \$3,000 within 60 days of November 10, 2004.
21. Sometime in May of 2005, KR's 2004 Federal, Missouri, and Kansas tax returns were prepared by a paid preparer.[\[5\]](#) The completed tax returns were then delivered to KR. KR signed the returns and gave them to Respondent.
22. Respondent told KR that he would attach a check for taxes due. Respondent told KR that he would file the tax returns.
23. Respondent sent KR the following letter, signed by Respondent on Clayton Financial

letterhead with an address of 546 NW Valleybrook Road, Blue Springs, Missouri 64014, and dated May 31, 2005:

As we discussed I filed the taxes for you in the tax year of 2004. The withdrawals from your IRA caused the following tax burden for you this year.

Federal Tax/\$1758.00 your responsibility
\$615.30
State of Kansas/\$816.00 your responsibility
\$326.46
State of Missouri/\$22.00 your responsibility
\$22.00

I will be responsible for \$1632.24 of the tax burden and you will be responsible for \$963.76 of the tax burden. I have paid all taxes and will take off of what you owed to offset your costs. Here is the rundown.

\$8,000/Principal
\$250.00/Bonus
\$800.00/Interest
\$963.76/Paid for Taxes
\$8086.24/still due

I am working on getting this cleared up before the end of June. I will need this time to get payments in and loans completed. Thanks again for your help.

Sincerely,
/s/ Gregory Bergman
Gregory Bergman

24. KR searched Internal Revenue Service ("IRS")[\[6\]](#) records and found that his tax return for the year 2004 had not been filed.[\[7\]](#)
25. On or about July 13, 2005, Respondent delivered a check to KR in the amount of \$750. KR deposited this check in KR's checking account and then wrote several checks from this account.
26. Respondent's check for \$750 was not honored. KR incurred service fees in the sum of \$595 due to insufficient funds and additional service fees.
27. Respondent's check for \$750 was finally honored and paid on or about August 23, 2005.
28. Respondent sent KR the following letter, signed by Respondent on Clayton Financial letterhead with an address of 546 NW Valleybrook Road, Blue Springs, Missouri 64014, and dated February 6, 2006:

I am writing this letter as first an apology for taking too long to get back with you in regards to the money still owed.

My plan this year is to begin sending money on a monthly basis in March and continue until paid in full. I have a total of five lenders who I am paying back for a total amount of \$29,300.00. I currently have receivables of \$30,500.00 with new business being added weekly.

My goal is getting these large cases approved, then feed money to you, so I can finish paying before the end of the year. Thanks.

Sincerely,
/s/ Gregory Bergman
Gregory Bergman

29. To date, Respondent has paid KR \$750.[\[8\]](#)

B. The Respondent's Response

30. On June 1, 2006, the Division sent a letter of inquiry to Respondent. The letter requested additional information about the transactions in question and advised Respondent that failure to respond within a reasonable time could result in proceedings to prohibit Respondent from offering or selling securities in this State.
31. On June 21, 2006, Respondent faxed a response to the Division's June 1, 2006 letter of inquiry. Respondent's response appeared on Clayton Financial's letterhead. Among other things, Respondent stated:
- a. "I have known [KR] for 12 years or longer, I worked with him and have been friends during this period of time and have helped him on numerous occasions during his trial of life. I handled his mutual fund account up to the day I left Great American Investors, Inc."
 - b. "I agreed to begin paying him back immediately, but the loan on my house did not go as planned and I will be paying him in full when the house sells. The house is now listed and for sale."
32. Respondent faxed to the Division copies of letters written on Clayton Financial letterhead that were addressed to KR revealing information regarding the transactions between Respondent and KR.

C. Additional Statement of Facts

33. The Division's investigation revealed that Respondent filed for Chapter 13 bankruptcy on March 13, 2006 with the U.S. Bankruptcy Court of the Western District of Missouri.
34. A check of the records maintained by the Missouri Commissioner of Securities revealed no registration, granted exemption or notice filing indicating status as a "federal covered security" for any of the alleged securities offered by Respondent in or from Missouri.

35. This Order is in the public interest and is consistent with the purposes of the Missouri Securities Act of 2003.

II. STATUTORY PROVISIONS

36. Section 409.1-102, RSMo. (Cum. Supp. 2005), reads in part as follows.

“Security” means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a “security”; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. . .

(D) Includes as an “investment contract” an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a “common enterprise” means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors;

37. Section 409.5-501, RSMo. (Cum. Supp. 2005), states that it “is unlawful for a person, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) to employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.”
38. 15 CSR 30-51.170 states (1) Grounds for the discipline or disqualification of broker-dealers or agents shall include, in addition to other grounds specified in section 409.4-412(d) of the Missouri Securities Act of 2003 (the Act), the following “dishonest or unethical practices in the securities business: . . . V. Borrowing of money or securities from a customer by an agent, or for an agent to act as a custodian for money, securities or an executed stock power of a customer.”
39. Under Section 409.6-604(d), RSMo. (Cum. Supp. 2005), in a final order the commissioner may impose a civil penalty up to one thousand dollars for a single violation or up to ten thousand dollars for more than one violation.
40. Under Section 409.6-604(e), RSMo. (Cum. Supp. 2005), the commissioner may charge the actual cost of an investigation for a violation of the act. Those funds may be paid into the investor education and protection fund.

41. The Missouri Commissioner of Securities is empowered to issue such orders as he may deem just. Section 409.6-604(a), RSMo. (Cum. Supp. 2005).

III. CONCLUSIONS OF LAW

Multiple Violations of Omitting to State Material Facts in Connection with the Offer of a Security

42. Paragraphs 1 through 41 are incorporated by reference as though fully set forth herein.
43. Respondent violated Section 409.5-501, RSMo. (Cum. Supp. 2005), when, in connection with the offer and sale of securities, in the form of an investment contract or evidence of indebtedness, in the State of Missouri, Respondent omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, including:
- a. That borrowing money from clients was grounds for discipline of KR under the rules of the Missouri Securities Act of 2003.
 - b. That Respondent did not have adequate finances to make the repayments agreed upon by KR and the Respondent.
 - c. That the securities Respondent offered and sold to KR were not registered in the State of Missouri.
44. Respondent violated Section 409.5-501, RSMo. (Cum. Supp. 2005), when Respondent omitted to state or disclose the material facts described immediately above.

Engaging in an Act, Practice or Course of Business that Operated as a Fraud or Deceit upon another Person

45. Paragraphs 1 through 41 are incorporated by reference as though fully set forth herein.
46. Respondent violated Section 409.5-501, RSMo. (Cum. Supp. 2005), when, in connection with the sale of securities in the form of shares of mutual funds, Respondent engaged in an act, practice or course of business that operated as a fraud or deceit on KR, when he:
- a. Through the course of negotiating and consummating two separate transactions, promised to pay KR \$8,000 plus interest as described above if KR sold mutual fund shares from his IRA and gave the \$8,000 to Respondent;
 - b. Provided KR written documentation of those transactions and promises;
 - c. Promised KR that he would repay KR within 60 days of KR's payments to Respondent so that KR would not have to pay a tax liability for taking an early IRA distribution as described above; and

- d. Despite his promises and written agreements to take certain actions, Respondent did not repay KR the principal or interest within the 60 days, or at all, as he promised.

47. Respondent violated Section 409.5-501, RSMo. (Cum. Supp. 2005), when Respondent engaged in an act, practice or course of business that operated as a fraud or deceit, as described immediately above.

IV. ORDER

NOW, THEREFORE, it is hereby ordered that Respondent, his agents, employees and servants, and all other persons participating in or about to participate in the above-described violations with knowledge of this Order, are prohibited from:

- A. offering or selling securities, as defined by Section 409.1-102(28), RSMo. (Cum. Supp. 2005), in the State of Missouri unless those securities are registered with the Securities Division of the Office of the Secretary of State in accordance with the provisions of Section 409.3-304, RSMo. (Cum. Supp. 2005);
- B. violating or materially aiding in any violation of Section 409.5-501, RSMo. (Cum. Supp. 2005), by, in connection with the offer or sale of securities, as defined by Section 400.9-102(28), RSMo. (Cum. Supp. 2005), making an untrue statement of a material fact or omitting to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; and
- C. Engaging in the acts, practices or courses of business described in paragraphs 5, 6, 8, 11, 12, 13, 14, 17, 18, 19, 20, 22, 23, 25, 26, and 28, above.

IT IS FURTHER ORDERED that, pursuant to Section 409.6-604(d), RSMo. (Cum. Supp. 2005), the Commissioner will determine whether to grant the Enforcement Division's petition for an imposition of a civil penalty of up to \$10,000 against Respondent for more than one violation of Section 409.3-301, RSMo. (Cum. Supp. 2005), in a final order, unless Respondent requests a hearing and shows cause why the penalty should not be imposed.

IT IS FURTHER ORDERED that as the Enforcement Section has petitioned for an award for costs of the investigation against Respondents in this proceeding, the Commissioner will issue a final order pursuant to Section 409.6-604(e), RSMo. (Cum. Supp. 2005), awarding an amount to be determined after review of evidence submitted by the Division, unless Respondent requests a hearing and shows cause why an award should not be made.

SO ORDERED:

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY,
MISSOURI THIS 15TH DAY OF NOVEMBER, 2006.

ROBIN CARNAHAN
SECRETARY OF STATE

(Signed/Sealed)
MATTHEW D. KITZI

COMMISSIONER OF SECURITIES

State of Missouri
Office of Secretary of State

Case No. AP-06-28

IN THE MATTER OF:

GREGORY DALE BERGMAN
dba CLAYTON FINANCIAL GROUP
CRD No. 2787786

Respondent.

Serve at:

546 NW Valleybrook Road
Blue Springs, Missouri 64014

NOTICE

TO: Respondents and any unnamed representatives aggrieved by this Order:

You may request a hearing in this matter within thirty (30) days of the receipt of this Order pursuant to § 409.6-604(b), RSMo Supp. 2005, and 15 CSR 30-55.020.

A request for a hearing must be mailed or delivered, in writing, to:

**Matthew Kitzi, Commissioner of Securities
Office of the Secretary of State, Missouri
Kirkpatrick State Information Center
600 West Main Street, Jefferson, Room 229
Jefferson City, Missouri, 65102**

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2006, a copy of the foregoing Notice, Order and Petition filed the above styled case was mailed by certified U.S. Mail, postage prepaid to:

Beth Perkins
Administrative Aide

[1] Great American has a business address of 6025 Metcalf Lane, Overland Park, Kansas 66202.

[2] MetLife has a business address of 10801 Mastin Blvd, Suite 600, Overland Park, KS 66210.

[3] State Street Bank and Trust has a business address of P.O. Box 8408, Boston, Massachusetts, 02266-8408.

[4] Internal Revenue Service, Publication 590 (2005) Individual Retirement Arrangements (IRAs), *available at* <http://www.irs.gov/publications/p590/index.html>.

[5] The tax preparer was Scott L. Ruther, J.D., Ruther & Associates, 8877 Bourgade, Lenexa, KS 66219.

[6] KR submitted a form 4506-T (Request for Transcript of Tax Return) to the IRS.

[7] KR had outstanding tax liabilities for 2004 of \$4,877 Federal, \$176 Missouri and \$1,194 Kansas.

[8] KR has not been compensated for the \$595.00 that KR was charged by KR's banking institution as a result of Respondent's insufficient funds to KR on July 13, 2005.